October 28, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*
WCB Docket No. 01-338

Dear Ms. Dortch:

ALTS and CompTel recently met with staff from the Wireline Competition Bureau to discuss the test proposed by the competitive wireline industry for determining when the removal of inter-office transport ("IOT") UNEs would no longer impair a competitive local exchange carrier.[1] This letter provides further information in support of that proposal.

The Presence of a Competitive Transport Provider that Owns Local Distribution Facilities in a Single Wire Center. The simple presence of alternative transport has no relevance to the impairment inquiry if a CLEC cannot economically connect to it or if it does not offer connectivity to the end users a CLEC seeks to serve. We can best make this point by first explaining the role of IOT, and then examining the particular facts under which alternative transport could serve as a meaningful substitute.

When CLECs use IOT from ILECs, the IOT span constitutes only one portion of the overall transmission facility between the CLEC switch and the end user. In addition, one end of IOT must ultimately connect to the CLEC switch, while the other end must connect to the end user. We will refer to these connections on the ends of IOT routes as "loops."

If a CLEC wishes to serve an end user at a location that happens to be served by a competitive transport provider that also owns its own loops (i.e., the competitive provider has local distribution facilities that reach the potential customer's location, as well as competitive transport facilities), then such a CLEC has the theoretical ability to use the alternative loop and transport instead of ILEC IOT and loop facilities. This theoretical

[1] Letter to Marlene H. Dortch from Jonathan Askin, ALTS, CC Docket No. 01-338, filed October 11, 2002, and letter to William F. Maher, Jr. from H. Russell Frisby, President, CompTel and John Windhausen, President, ALTS, WCB Docket No. 01-338, filed October 8, 2002 ("*ALTS/CompTel 10/8/02 UNE Transport Ex Parte*").

ability has no implications, of course, unless the cost of reaching the competitive transport provider, combined with the competitive provider's charges, is economically feasible.[2] In cases where this ability exists, our proposed test would allow ILECs to offer such a showing, and we would be happy to make this opportunity more explicit in our proposal.

However, we respectfully but emphatically disagree with the position that the mere existence in an ILEC wire center of a competitive transport provider that owns local distribution facilities somehow supports the removal of all – or any – IOT UNEs extending from that office. As noted above, the existence of such a competitive transport provider might support an ILEC showing that certain IOT routes from such offices are no longer needed as UNEs, but only in cases where competitive IOT can be used cost-effectively to serve potential end users reached by that competitive provider. That showing would not and could not apply to those same IOT routes when they are needed by CLECs to serve end users not reached by the competitive transport provider's local distribution facilities, nor would such a showing necessarily have any implications for any other IOT route extending from that ILEC wire center.[3]

Furthermore, the fact some CLECs might be collocated in a wire center containing a competitive transport provider that owns local distribution facilities has relevance only to the costs such CLECs would have to incur in order to connect to that competitive transport provider. The presence of those CLECs in that wire center, and their associated cost of connecting to the competitive transport provider – assuming the ILEC permits them access to that provider – has no implications for non-collocated CLECs (and, obviously, even collocation with such a transport provider has no implications for the collocated CLECs in situations where they seek to serve end users not reached by the competitive distribution facilities).

The manifest flaws of a test that relies solely upon the existence in a wire center of a competitive transport provider that owns its own local distribution facilities underscores the dangers posed by any "test" that disregards the highly fact-specific environment in which CLECs actually make their transport acquisition decisions. Our proposal fully accommodates the ILECs' ability to point to the existence of competitive distribution facilities in those fact situations where their presence actually does mitigate the CLECs' need for IOT UNEs, while insuring that IOT UNEs are not removed in situations where they are still required by CLECs.

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[2] This theoretical ability often may not prove practical. CLECs switches cover large geographic areas, so CLECs may not have cost-effective access to all competitive transport/loop providers within their service territory.

[3] Indeed, the relative scarcity of competitive distribution facilities compared to ILEC loops suggests that the presence of a competitive transport provider owning its own loops would typically implicate only a small portion of a wire center's outbound routes.

The Role of Self-Provisioned Transport Providers Under the ALTS-CompTel Test. Any self-provisioners of transport that could potentially provide competitive transport over specific routes would have a role under our proposed test, provided the ILECs could demonstrate that such providers qualify as "uncommitted entrants" that actually discipline transport prices under well-established economic principles.[4] However, the record evidence in this proceeding does not suggest that many – if any – self provisioners currently qualify as "uncommitted entrants." Self-provisioners that are not currently wholesaling frequently lack appreciable excess capacity, and the sunk costs of entering the wholesale business, in terms of investment in marketing, sales, back-office customer support and the incremental capital expenditures to expand capacity, have been and continue to be sufficiently high to discourage such entry.[5]

Distinguishing Facilities-Based Transport Providers from Resellers. We believe a facilities-based transport provider must offer transport capacity via fiber it either owns, or else leases from a third party via a long term lease.

The Feasibility of Using Multiple Vendors of Transport and Loops to Provide a Usable Single Facility. CLECs currently lack the economic or operational ability to combine multiple transport and/or loop vendors within a single route (with the exception of certain routes that traverse collocation facilities where some CLECs have managed to interconnect ILEC loops with competitive transport). As shown in the comments in this proceeding, accountability issues between competitive vendors, or between ILECs and competitive vendors, generally preclude the use of ILEC loops and/or transport with non-ILEC transport in the current network environment. However, because it would be in the long-term interest of the competitive industry to be able to "piece-part" transport, as well as loops, and thereby generate as much price competition as possible, we do not wish to preclude this possibility. Our point is simply that the ILECs would bear the burden of demonstrating when such potential combinations have become real options. Some of the issues that would need to be solved in order to make multi-vendor transport/loop provisioning feasible are appended to this ex parte (Attachment A).

Lack of Alternative Providers at the DS-1 Level. If a CLEC needs transport at the DS-1 level (i.e., it lacks the traffic to purchase at the DS-3 and higher levels), then any removal of the DS-1 transport UNE obviously impairs that CLEC. Further, for a variety of operational and marketplace reasons, there is no basis for an assumption that any competition at the DS-3 level, to the extent it exists, somehow equates to competition at the DS-1 level.

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[4] *See e.g.* Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Revised April 8, 1997, Section 1.32.

[5] Affidavit of Michael P. Duke, Director of Governmental Affairs, KMC Telecom, Inc., April 4, 2002, CC Docket No. 01-338, filed April 5, 2002, paras. 12 –14.

The Impact of ILEC Misconduct on the Impairment Analysis. Our filings have highlighted ILEC misconduct that has been designed to discourage or prevent the use of UNEs or third party alternatives in favor of special access. ILEC "no facilities" claims, and their unlawful extension of the restrictions placed on conversions of special access to EELs (i.e., applying those restrictions to new EELs and imposing "commingling" restrictions on stand-alone loop and transport UNEs), are but two examples. We believe that these practices are unlawful today and that the Commission has ample statutory authority to take additional steps to curb such behavior. Our filings have addressed these issues, however, we would be happy to address any particular concerns you would like discussed in more depth.

As to the interplay between ILEC misconduct, such as their "no facilities" policies and the unlawful extension of use restrictions, with the Commission's impairment analysis, a different legal analysis is involved. That analysis is grounded in the principle that impairment exists regardless of whether behavior contributing to impairment should be or could be corrected (on grounds that it is anticompetitive or otherwise unlawful). For example, if ILECs are not providing "through testing" in coordination with competitive transport providers, and thereby are forcing CLECs to purchase IOT UNEs, or even to abandon IOT UNEs entirely and purchase special access instead, then it is irrelevant for an impairment analysis whether that ILEC conduct could or should be corrected. The only conclusion that can be drawn in such circumstances is that removal of the transport UNE cannot currently be justified.

Indeed, even if the Commission were to order ILECs to cure conduct that currently forces the CLECs to purchase IOT UNEs or special access instead of using alternative providers, that directive would not by itself have implications for the Commission's impairment analysis until such time as experience shows the ILECs were in full compliance. The history of the '96 Act has revealed a remarkable ability by the ILECs to duck, evade, stay, or otherwise avoid their regulatory requirements. We welcome any attempt by the Commission to cure ILEC evasions, but we respectfully point out that such efforts must first be validated in the real world before they can serve as the basis for the removal of any UNEs.

Commission Authority to Prohibit "Commingling" Restrictions On Multi-Vendor IOT. We stress that under our proposed granular test for IOT UNE impairment, ILECs must abandon any restrictions on "commingling" that would prevent a CLEC from connecting alternative provider facilities or special access to UNEs. To state the obvious, if an ILEC is no longer required to provide IOT as a UNE over a specific span, then the CLEC must be able to connect UNEs at either end of that route to the alternative provider facilities that are available over that span (and which served to justify elimination of the UNE obligation with respect to that specific route in the first place). In

addition, the CLEC must also be permitted to connect to special access at either end of that route if the CLEC prefers.[6]

Further, the Commission has two independent sources of authority for prohibiting the "commingling" restrictions described above. Section 251(c)(3) of the Act requires ILECs to provide access to unbundled network elements on an unbundled basis on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Under this provision, the Commission may require that ILECs permit UNEs to be connected to alternative provider facilities or to special access service because it is not a just and reasonable practice to prohibit CLECs from doing so. The Commission may also require under Section 201(b) that ILECs permit special access service to be connected either to alternative provider facilities or to UNEs because it is an unreasonable practice to impose such restrictions. The Commission may also prohibit these "commingling" restrictions under the nondiscrimination obligations of Section 251(c)(3) and of Section 202 because ILECs impose no such restriction on their own deployment of facilities, to the extent they obtain facilities from other providers. We request that the Commission promptly make these determinations, not only as part of any granular test for IOT, but as a general matter in order to promote facilities-based competition.

Acceptability of the HHI Test, and Other Key Test Criteria. The HHI analysis utilized in our proposal has been relied upon by the Commission when analyzing market concentration in emerging telecommunications markets. Indeed, only eight years ago the Commission found that six PCS competitors were required for effective competition, and expressly relied upon an HHI analysis to support its conclusion that a two- or three-competitor market would be unduly concentrated.[7]

Concerning the third and fourth criteria[8] of our proposed test, our central points here are simply that: (1) if the ILECs assert that "multi-vendor" scenarios generate price

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[6] Although the ILECs claim that CLECs are free to obtain transport from alternative providers, the ILECs are currently limiting the ability of alternative providers to compete in the inter-office transport market. In particular, most ILECs do not permit competitive fiber providers to access central offices at all, or in any fashion that could permit them to readily provide service to CLECs collocated in a central office. Accordingly, as a precondition of any granular test for IOT, the Commission should clarify that ILECs must permit competitive fiber providers to extend multi-strand fiber into the central office, and to terminate it on a fiber distribution frame in the central office vault, or in some other suitable location in the central office, for the purpose of providing service to collocated CLECs.

[7] *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, FCC 96-278 released June 24, 1996, paras. 98-100.

[8] *ALTS/CompTel 10/8/02 UNE Transport Ex Parte* Criteria (3) and (4) read as follows:

> (3) ILECs or other carriers providing loop or any other "last mile" facilities used in conjunction with alternative transport routes would have to agree to participate in multi-vendor "end-to-end" testing adequate to assure service quality; and,

discipline supporting the elimination of IOT UNEs, that claim must be based on real-world experience, and such experience does not currently exist; and (2) the ILECs cannot impose unannounced financial and operational conditions and penalties upon the CLECs if and when the CLECs do migrate UNE traffic to other configurations.

Operation of Our Proposal In a Multi-Span Environment. Under our proposal the removal of an IOT UNE for a single span has no implications for any multi-span IOT UNEs that happen to traverse that single span unless, per the discussion above, the ILEC can also show that competitive transport for that single span can be successfully combined as an economic and operational matter with the remaining IOT UNE spans. CLECs will remain impaired over a multi-span IOT route not withstanding that an ILEC could otherwise meet the granular test for a segment of the route until such time as CLECs can as a practical and operational matter under ILEC provisioning procedures readily include alternative provider facilities as part of a multi-span IOT route, based on substantial real world evidence.

Pricing of Transport. The price of transport is part of a CLEC's overall cost and revenue structure. Consequently, we cannot state an acceptable raw price ceiling for transport, nor can we state a cost ceiling as a percentage of revenue, since CLEC business plans and market expectations differ, and fluctuate even for individual CLECs over time with customer demand, market experience, and cost of capital.

Inasmuch as TELRIC remains the best measure of actual cost for ILECs, any requirement that CLECs pay more than TELRIC for transport, combined with their smaller market shares and higher costs of capital, will impair their ability to compete with ILECs. We also note that the "cost" that a CLEC experiences in seeking to use alternative providers includes issues of timeliness, ubiquity, and quality, in addition to the actual price paid to alternative providers, as has been noted by the Commission elsewhere.

Impact of CLEC Product Suites on an Impairment Analysis. The products offered by a CLEC typically provide little insight into its need for interoffice transport. A CLEC offering broadband services to residential customers might have little need for interoffice transport if it is owned by a cable company, and targets only cable residential customers. On the other hand, a CLEC that offers broadband services to residential customers might have great need for interoffice transport if it uses DSLAMs located close to the residential users in numerous end offices. In short, product suites are relatively

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(4) The petitioning ILEC would have to offer robust guarantees that current transport UNE traffic would be migrated to competitive carriers or alternative ILEC services without service disruptions at a CLEC's request. As noted above, CLECs could replace all or a portion of UNE transport with any combination of services and facilities, including self-provisioning, third-party provisioning, purchases of retail or wholesale ILEC services, purchases pursuant to section 271(c)(1)(B), etc.

independent of network platforms in general, and independent of a CLEC's use of IOT UNEs in particular.

The Evidentiary Burden of Demonstrating Whether Our Proposed Granular Test for IOT Has Been Met. The ILEC should bear the burden of providing information showing that it is no longer obligated to provide IOT as a UNE on a specific route because normally only the ILEC has access to this information. In those narrow circumstances where it is the CLEC that may have primary access to information as to the availability of alternative providers at a particular end point of a specific IOT route that the ILEC seeks to have removed from its UNE obligations, it may be reasonable for a
state Commission to require the CLEC or third party providers to provide that information.

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We would be happy to discuss this important matter with you further at your convenience.

Sincerely,

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Marlene H. Dortch
October 28, 2002
Attachment

ATTACHMENT A

This is a sample of some of the economic and technical problems created by a multi-vendor environment when provisioning a facility from A to Z, via individual loops and spans A, B, C, etc., when some of those individual portions would no longer be available as UNEs, and thus require alternative vendors:

1) A multi-vendor environment implies increased intervals. Often, it will prove to be that one leg of the circuit must be designed (*i.e.*, made CFA available), before the next segment of the circuit could be ordered/provisioned. In most instances this would add days to the process.

2) Once all segments have been provisioned, each segment would need to be accepted individually, and then the circuit would need to be accepted end-to-end. This entails a great deal of coordination and cost (*e.g.*, IXCs currently offer a Total Service solution, charged at significantly higher rates, to coordinate the ordering/provisioning/acceptance and maintenance of a multi-vendor circuit).

3) Because no one vendor would have end to end responsibility for a circuit, there are serious issues with repair and maintenance. There is currently no ability for a CLEC to sectionalize repair issues. All vendors must be contacted in order to isolate a trouble. This substantially increases repair intervals and frequently leads to finger pointing. In addition, to test the end to end continuity of a circuit, all vendors/techs would need to be available simultaneously (this is frequently referred to as a vendor meet).

4) In order to support a multi-vendor environment, additional cross-connects may be required, adding more complexity and cost to the circuit.

5) Monthly costs will be increased, as well as NRCs. If a CLEC orders a circuit from A to Z, and UNEs are not available on, say, three separate portions of that circuit, the CLEC could likely pay three (3) additional NRCs, and appreciably greater MRCs (because savings on monthly charges are usually linked to overall volume commitments to a single vendor, such commitments would be much harder to meet in a multi-vendor scenario).